Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term 1993

No.

CESAR ANTONIO BUENO,

Petitioner,

v.

CITY OF HUNTINGTON PARK,
Respondent.

Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Two; Appendix

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QUESTIONS PRESENTED FOR REVIEW

1.) In an action in which attorney's fees are claimed under 42 U.S.C. Section 1988, may a state court employ a ratio of successful to unsuccessful defendants to reduce the attorney's award?

2.) Must the fees awarded the attorney be proportionate to the damages awarded to the plaintiff?

3.) May a state court of appeals employ a state standard of review to affirm a reduction of attorney's fees under 42 U.S.C. Section 1988? That is, may a state court affirm a reduction for "unspoken" reasons where the trial judge is not "forth-coming"?

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4.) Does not the Supremacy Clause require a state court of appeals to apply the federal rule of review to a claim of fees under 42 U.S.C. Section 1988 such that where the reasons for the reduction of the award are "unspoken," the matter must be remanded for findings before a review can be had?

5.) Where the state trial court reduces an attorney's fees award under 42 U.S.C. Section 1988 by 87% because the attorney had first successfully tried a criminal case from which the subsequent successful Section 1983 civil case was brought, may the Section 1988 award of $30,000 be pegged to the billed but unpaid fee of $22,000 for the criminal case because the civil case was merely "a repeat performance?"

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Opinions Below

(R.14.1(d))

The opinion of the Court of Appeal is not officially reported but it is reproduced in the Appendix as Exhibit A at page 26. The California Supreme Court denied review on July 27, 1994 without further opinion. (App., Exhibit C, p. 39).

Jurisdiction

Jurisdiction of this court is based on 28 U.S.C. Section 1257 which permits petitions to this court where "any title, right, privilege or immunity is specially set up or claimed under the Constitution... or statutes of...the United States."

Petitioner Bueno prevailed on his Section 1983 claim in state court where a jury awarded him $35,000. The issues here relate to petitioner's attorney's right to attorney's fees under 42 U.S.C. Section 1988, and they raise a substantial federal

question as the state failed or refused to award fees in accord with federal law.

Jurisdiction is also claimed under a Judicial Power Clause of the Constitution, Article III, Sections 1,2.

Constitutions, Statutes, Etc.

1.) 42 U.S.C. Section 1988 provides in pertinent part: "In any action or proceeding to enforce a provision of Sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2.) The Supremacy Clause provides that Federal Law shall bind state court judges.

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Statement Of The Case

Petitioner Cesar A. Bueno was arrested for public drunkenness (P.C. Section 647(f)) and prosecuted in a municipal court, which dismissed the case after the jury voted 11 - 1 to acquit. Bueno was represented by Thomas Beck, a prominent civil rights attorney. Bueno incurred $22,000 in legal fees for his defense, an amount still unpaid.

Beck then filed an action against the city of Huntington Park and six named police officers for damages in violating Bueno's civil rights under 42 U.S.C. Section 1983 by falsely arresting him for public drunkenness. Several common law and statutory claims under state law were also made but the common core of facts was the false arrest and imprisonment, the conspiracy to use excessive force, and subsequent malicious prosecution.

On January 28, 1993 a jury found for Bueno in a total amount of $35,000 but against only two of the six police officers, Ault and Luna, for the false arrest and imprisonment under both the Section 1983 and the common law claims. The same jury found for the four other officers as to all claims, and plaintiff dismissed the charge against the city under Section 1983 only. By stipulation, it was agreed that the city is liable vicariously for the common law causes of action.

On February 16, 1993, Bueno's attorney, Beck, moved for $114,565 in attorney's fees under the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C.A. Section 1988. The amount of the lodestar figure was obtained by multiplying 416.6 hours of legal services by an hourly rate of $275.00

The fee request was supported by a detailed 34 page itemization of services. It was also supported by three civil rights attorneys' declarations attesting to Beck's skill, reputation, and standing among the civil rights Bar. The request included a survey of fees customarily charged by attorneys in Southern California showing a range of $85-$400 depending upon city, years of practice, and year of graduation. The defendants objected to the rate but did not challenge the number of hours.

The trial judge (Higa, J.), admitting it was his first civil rights case, cut the request by 87% to $30,000, stating, as Beck "received" $22,000 for the criminal defense of Bueno (fees actually unpaid), that that figure was a "good place to start." No other explanation for the reduction was given. A motion to reconsider

the award was denied on the grounds that if $22,000 was fair for Bueno's criminal defense, $30,000 was reasonable for his civil case. Again, no other articulation was made.

Beck appealed. The Court of Appeal, in an unreported opinion by Justice Nott, held that, although the trial court "might have been more forthcoming," the civil trial was a "repeat performance" of the criminal trial for which Beck had been "paid" $22,000. The court also held that "unspoken factors" supported the award. The court affirmed on May 9, 1994. (Appendix, Exhibit A.) A petition for rehearing was denied on June 2, 1994. (Appendix, Exhibit B.) The California Supreme Court denied review on July 27, 1994. (Appendix, Exhibit C.)

Federal law required the consideration of several factors - and those

factors only - in making an award. The fee for an earlier criminal trial is not one of them, and basing the award thereon, and affirming it, is clearly erroneous.

Federal law also requires findings of fact and/or the articulation of reasons for the award be made. No such findings or articulation were made here. And, indeed, the court of appeal affirms for "unspoken factors."

The case presents an important question of federalism and of federal supremacy in state courts, about which this court needs to speak.

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Reasons To Grant The Writ

I.

The State Court's Action Is Suspicious

This petition presents an important question of federal supremacy in state courts - a question of enforcement in the face of state hostility to federal rights. There is no doubt that federal law applies as even the California Supreme Court has held that state courts are bound by the interpretation of federal statutes made by federal courts. Mackenzie v. Hare, 165 Cal.776, 779. But where, as here, that principle is not even paid lip service, indeed where the hierarchical order is inverted in practice without being acknowledged formally as such, this Court has no choice but to intervene. Otherwise state courts will get the notion they can dress their opinions in federalese while applying state law, sub silentio.

This situation was addressed, albeit

indirectly, when Congress, at this Court's urging, abolished the court's compulsory appellate jurisdiction over certain state court judgments. Both the President and Congress were of a mind that so much social progress had been made in the country as a whole that state court adjudications of federal rights were no longer suspect. There was no longer a need for routine federal scrutiny; and, indeed, many states had adopted laws equal to, if not broader than, their federal counterparts in guaranteeing all sorts of civil rights. Thus, the "new federalism" ushered in a period of newfound trust for state action which, judicially, found its symbolic embodiment in the repeal of this court's mandatory jurisdiction. All review is now discretionary. 42 U.S.C. Section 1257.

Alas, the new optimism was hedged by some commentators who foresaw a continuing need for federal review of state action

where instances of palpable hostility to the enforcement of federal rights appeared. In such cases, as here, it was expected that this court would exercise its discretionary jurisdiction to assert, indeed to reassert, its commitment to the protection of individual rights, especially those enacted by Congress. (See generally, Siegal, Commentary, 42 U.S.C.A. Section 1257, p.42.)

In this connection, where judgments for violations of Section 1983, even when overwhelmingly proved, tend to be small, attorney's fees alone provide the deterrence to further violations by local governments at all levels. Where an individual's civil rights are vindicated, an attorney's fees award rounds out and completes a strong federal policy binding in state courts. (See, Riverside v. Rivera 477 U.S. Section 561, 575.) A high, but not unreasonable, fee award thus furthers the federal policy of deterring state misconduct. There needs

to be a uniformity of application between state and federal courts if this policy is to be effective.

II

The Court Of Appeal Applied State, Not Federal Law

The thrust here is to show that in practice, but sub rosa, the court applied state, not federal, law. Under state law the lodestar figure may be reduced by the number of the claims lost. (Sokolow v. County of San Mateo (1989) 213 Cal.App.2d 231.) But under federal law, the degree of success is not measured by the number of defendants prevailed against. (Riverside v. Rivera, supra, 477 U.S., at pp. 570-571.)

Thus, the entirety of paragraph two on page six of the court's opinion is given over to reciting the "unspoken" factors

favoring the award, i.e., winning on only 1 of 9 causes of action, prevailing against only two of seven defendants, and the award of [appropriately enough] 2/7 of the fee requested. But these factors are relevant only under state, not federal, law, federal law which controls under the Supremacy Clause. (Felder v. Casey, supra, 487 U.S., at pp. 150-151.) The state court writes as though it could ground its affirmance on an independent state basis when nothing could be further from the truth. Such reasoning raises the issue, nonetheless, that state law is the actual, though not the express, basis of the opinion. Indeed, it is impossible to separate the two as the court itself subjects "unspoken" factors "to consideration [in] support [of] the trial court's position," as suggested by the city's brief, a practice prohibited by law. (Opinion, p.34; Exhibit A; Hayes v. Heckler (9 Cir. 1986) 785 F.2d 1455, 1457.) Thus,

it must be clear that the judgment cannot stand as the factors set out are not cognizable under federal law as a matter of law, and it is federal, not state, law which governs. To consider improper factors is an abuse of discretion. (Foster v. Mydas Assoc. (1 Cir. 1991) 943 F.2d 139, 143.)

This, too, is an area of confusion which this court alone can clear up by stating unequivocally that to the extent state law deviates from its federal source, state law cannot cut down a federal claim.

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III

The Court Abused Its Discretion

A.

Federal Standards Of Review Apply

The quizzical feature of the Court of Appeal's opinion is that it affirms despite noting that the trial court was not "forthcoming" in its reasoning process. It then resorts to unspoken factors to affirm. (Opinion, p.34; Exhibit A.) It is as though the court applies the state rule of appellate review that a decision right for any reason will be affirmed.

Such is not enough under federal law, however. The court of appeal relies upon a federal rule that an award will be reversed only for an abuse of discretion. (Opinion, p.32.) But to this rule there is an exception where there is no rationale stated for the trial court's reduction. Where the

trial court's order contains no information or explanation for its award of fees it is impossible to review it for an abuse of discretion, and the case must be remanded. (Thorne v. City of El Segundo (9 Cir. 1985) 802 F.2d 1131, 1142; see also, Hayes v. Heckler (9 Cir. 1986) 785 F.2d 1455, 1457 (Per Curiam).) It follows as a necessary corollary that the appellate court cannot affirm on "unspoken" factors as it remains important for the trial court to provide a concise but clear explanation of its reasons for the fee award. (Hensley v. Eckerhart (1983) 461 U.S. 424, 437.) After all, a principal purpose of the statute is to educate all officials involved with civil rights.

Again, the California court appears to confuse state and federal standards of review. This court is, again, presented with an area of concurrent jurisdiction which needs sorting out as under the federal

standard the lack of articulation and, the consequent need of supplying of "unspoken" factors, ipso facto, requires a remand.

B.

Federal Substantive

Law Applies

In reaching to affirm on the stated grounds, the Court of Appeal refers to the trial court's only statement - indirect, indeed - that it would "start" with the $22,000 "award" in the criminal case to then award $30,000 in the civil case. But such consideration is not allowed. The award of fees in the prior action is an "inappropriate consideration" in deciding reasonable attorney's fees "in a later and entirely distinct case..." (Rutherford v. Pitchess (9 Cir. 1983) 713 F.2d 1416, 1421; see also, Blanchard v. Bergeron (1989) 489 U.S. 87, 93-95.)

The Court of Appeal holds that the civil rights trial was a "repeat performance" reducing the complexity of the case - an amazing assist to a barren record, an assist prohibited, as shown in A., supra. But compounding the error of comparison between the two cases is a total misunderstanding of the purpose of the award, which is to compensate the attorney for the time reasonably spent. (Thorne v. City of El Segundo, supra, 802 F.2d, at 1143.) This, in turn, is not, as the court assumes, a function of complexity alone, but a function of whether the time spent on the unsuccessful claims was related to the successful claim. (Id., at 1141). This question was not reached because the Court of Appeal applied the wrong standard. The state court does not address the relatedness issue, because it notes that as Mr. Beck prevailed only as to 2 of 7 defendants, the award could be reduced by 5/7th as a

"reasonable" reduction for his lack of success. As shown above in Point II, this might be so under state law, but it is wholly contrary to federal law which allows compensation even as to unsuccessful claims where they are related to the successful claim. (Ibid.) But, again, this issue was not reached as the court confused state and federal standards of review.

For the court of appeal to say, as if in resignation to its added case load (actually an expression of trust), that each case "must be decided on its own merits" (Appendix, Opinion, p.36), is the ultimate irony as no reasons were given by the trial court. The only reason adverted to is inappropriate, and the appellate court itself resorted to "unspoken" reasons, the tacit assumption of which is that no merits were consciously reached! To "perceive...exactly what occurred here" (Opinion, p.36) in the face of a barren

record requires speculation, if not clairvoyance, powers beyond the law, federal or state, and indeed in contravention of both.

C.

Proportionality Is An

Erroneous Standard

In finally disposing of the case, the Court opines, "...the federal statutes were not designed to enrich attorneys in the wake of a result which was minor in relation to the time expended. We perceive that is exactly what happened here." (Append., p.36) Is it not apparent that the court is imposing the proportionality standard rejected by this court in Riverside v. Rivera (1986) 477 U.S. 561, a case, ironically, cited by the court? How this could be escapes us entirely. This court in Riverside rejected that city's argument that attorney's fees must be proportionate to the

damages obtained. This court pointed out that a civil rights action for damages cannot be judged by the monetary recovery alone; there is also a nonpecuniary public benefit served which must be considered in making a fee award.

The California court cites cases where the fee awards were low or nonexistent to illustrate its point. But, our argument is not with those cases, but with the adoption of the proportionality rule as such. It is the rule applied, not the case results, that is error, the very error rejected by this court in Riverside. Again, is not the court merely paying lip service to the federal rule while at the same time substituting its own predilections in rendering a judgment? This becomes abundantly clear when in a footnote, the court expresses its personal dissatisfaction with the "system." (Appendix, p.34,n.2.) The hostility is both palpable and overt.

IV

Summary Remand

Is Appropriate

The Ninth Circuit has time and again remanded attorney fees decisions to the trial courts for specific findings of fact and conclusions of law because without them there can be no meaningful review. These decisions are not, of course, binding on this court. But they are binding on the state courts, as even the California Supreme Court recognized in Mackenzie v. Hare, supra, in another context.

Even a partial listing of federal precedent in the Ninth Circuit alone overwhelmingly establishes the point that specific findings and conclusions of law must be made or a remand results. See, e.g., Hayes v. Heckler, 785 F.2d 1455 (9 Cir. 1986); U.S. v. 313.34 Acres of Land in Jefferson County, 897 F.2d 1473, 1477 (9 Cir. 1989); Church of Scientology of

California v. U.S.P.O., 700 F.2d 486 (9 Cir. 1982); D'Emanuelle v. Montgomery Ward & Co., Inc., 904 F.2d 1379 (9 Cir. 1986); Cunningham v. County of Los Angeles, 879 F.2d 473 (9 Cir. 1988).

Against this background, the errors of the courts below are clear beyond a shadow of a doubt. Indeed, the court of appeal virtually confesses error by affirming for unspoken reasons. Therefore, full briefing and oral argument here is unnecessary and summary remand is appropriate. See, e.g., Meeks v. Georgia S.& F.R.Co., 377 U.S. 405 (1964.) A summary remand is appropriate where the law is well-settled and stable, the facts are not in dispute, and the decision below is clearly in error. (Schweiker v. Hansen 450 U.S. 785, 791 (1981); Wyrich v. Fields, 459 U.S. 42, 51 (1982).

Such is the case here.

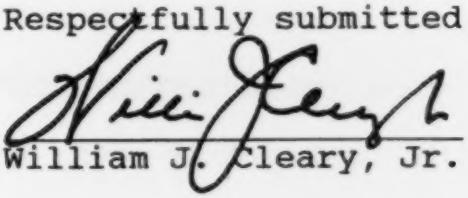
Conclusion

For the reasons already advanced, petitioner Bueno asks the court to grant his petition and to summarily remand and reverse. The California court affirms, for "unspoken" reasons, the very antitheses of the legal requirement, effectively confessing error. And the only factor the trial court adverts to, repeated on appeal, is the cost of the first, criminal trial, a cost billed but unpaid, and a factor not cognizable under federal law. Then, the court of appeal applies a success ratio to affirm, a ratio prohibited by federal law but permitted under state law. Such a surfeit of error raises a suspicion of hostility to federal rights, a suspicion confirmed by the court's expressed dissatisfaction with the "system" (Opinion, p.34, n.2) and by the overt adoption of the proportionality rule, rejected by this court in Riverside. All of this represents error

so egregious that inattention alone cannot explain it. Hostility, both overt and covert, are the only reasons which can explain an opinion so lacking in the comprehension of the law it purportedly follows. The appearance/reality conflict, so clear in this case, is further evidence that the proverbial wolf in sheep's clothing roams the range of the new federalism and nothing but summary action is likely to curb its wanderings.[1]

Date: August 17, 1994

Respectfully submitted,



William J. Cleary, Jr.

[1] (Petitioner asks for attorney fees in this court. Texas State Teachers v. Garland, 489 U.S. 792 (1989).)

Appendix

Exhibit A:
Opinion Of The Court of Appeal..... 26

Exhibit B:
Order Denying Petition For Rehearing 38

Exhibit C:
Supreme Court's Order Denying
Petition For Review..... 39

Exhibit A:

Opinion Of The Court of Appeal

Not To Be Published

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

CESAR ANTONIO BUENO, Plaintiff and Appellant, vs. CITY OF HUNTINGTON PARK, A Municipal Corporation, et al., Defendants and Respondents.	B076029 (Super. Ct. No. SEC74315)

Appeal from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed.

Thomas E. Beck & Associates, and Robert M. Neubauer, for Plaintiff and Appellant.

Lynberg & Watkins, Norman J. Watkins and William F. Bernard, for Defendants and

Respondents Eric Ault and Antonio Luna.

Appellant Cesar Bueno appeals from an award of attorney fees, claiming the award is too low. We affirm.

FACTS

The operative facts are not in dispute. Appellant was arrested under Penal Code section 647, subdivision (f) for being drunk in public. A jury trial resulted in a deadlock, with 11 jurors favoring acquittal. Understandably, the trial judge dismissed the case in the interests of justice.

Appellant employed Thomas Beck, the same attorney who represented him in the criminal proceedings, to file a complaint for damages under 42 U.S.C. section 1983, alleging a violation of appellant's civil rights by six Huntington Park police officers. Also included were two causes of action against the city of Huntington Park

for utilizing unconstitutional customs, policies and practices, and for negligent employment of the six officers.

The civil jury trial ended with verdicts only against two of the police officers, respondent Ault ($20,000) and respondent Luna ($15,000). Defense verdicts were entered in favor of the other four officers and the city of Huntington Park. The jury specifically found that appellant was falsely arrested by respondents, but that he was not the victim of excessive force or malicious prosecution. Further, the jury did not find that appellant was assaulted or battered, or that he suffered emotional distress. Finally, the jury did not find a violation of custom, policy or practice or negligent hiring by the city of Huntington Park.

Appellant filed a motion for

attorney fees under 42 U.S.C. section 1988.[1] The request was for $114,565 based on 416.6 hours at $275 per hour. The trial court, noting that Mr. Beck had previously been paid $22,000 in defense of the criminal action, awarded appellant $30,000. Appellant's motion for reconsideration was denied.

ISSUES

Appellant's interrelated claims are: "[I] The trial court utilized impermissible guidelines and improper methodology in arriving at its award of attorney's fees. [Section] [II] Respondents failed to rebut the reasonableness of

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[1] That statute provides in pertinent part; "In any action or proceeding to enforce a provision of section 1981, 1981a, 1982, 1983, 1985, and 1986 of this title,...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

appellant's presumptively valid attorney's fee request."

DISCUSSION

In order to set an award of attorney fees in a civil rights case, the trial court must first determine who is the prevailing party. (42 U.S.C. Section 1988.) Here, the court found that to be appellant. Next, the court is required calculate a "lodestar" figure of attorney fees as the starting point. That calculation involves multiplying a reasonable hourly billing rate by the number of hours reasonably expended. (Blum v. Stenson (1984) 465 U.S. 886, 888.) In determining the lodestar, or whether to adjust the lodestar, the trial court should consider such factors as the novelty and difficulty of the case; the skill required to litigate the issues; the preclusion of other employment; the customary fee; relevant time constraints; the amount at

stake and the result obtained; the experience, reputation and ability of the attorney; the nature and length of the relationship between the attorney and the client; the undesirability of the case; and awards in similar suits. (Johnson v. Georgia Highway Express, Inc. (5th Circuit 1974) 488 F.2d 714, 717-719 (overruled by Blanchard v. Bergeron (1989) 489 U.S. 87, 96 to the extent that a contingent-fee agreement cannot be a ceiling upon the fees recoverable); Kerr v. Screen Extras Guild, Inc. (9th Cir. 1975) 526 F.2d 67, 70.)

Appellant contends that the trial court failed to: calculate the lodestar figure; explain how the lodestar was calculated; analyze the fee award under the Johnson-Kerr guidelines; and comment on its rejection of the moving party's proof. Appellant concludes that such failure amounts to an abuse of discretion that constitutes reversible error. (Moore v.

Jas. H. Matthews & Co. (9th Cir. 1982) 682 F.2d 830, 838.) We disagree.

Even though the trial court must state on the record its reasoning, it is not required to discuss each of the Johnson-Kerr guidelines in depth, so long as the court articulates with sufficient clarity the manner in which it made its determination. (Quesada v. Thomason (9th Cir. 1988) 850 F.2d 537, 539.) The court is not required to make precise calculations. The trial court may identify specific hours to be eliminated, adjust the hourly billing rate, or simply reduce the amount for limited success. (Hensley v. Eckerhart (1983) 461 U.S. 424, 436, 437.) On appellate review, the trial court's determination will not be disturbed absent a clear abuse of discretion. (Rutherford v. Pitchess (9th Cir. 1983) 713 F.2d 1416, 1420.)

A fair reading of the reporter's transcript indicates that the trial court

reviewed the points and authorities of each side, including those setting forth the expertise of appellant's counsel, his normal billing rate, and the number of hours expended. The court stated that it understood the lodestar method. However, the trial court recognized that Mr. Beck received $22,000 for defending appellant at the criminal trial. As appellant concedes, most of the same witnesses who testified at the criminal trial testified at the civil trial, thus obviating the need for substantial amounts of pretrial discovery. In sum, the trial court stated that it felt that if $22,000 was fair for the first trial, then $30,000 was fair for what was in

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essence a repeat performance.[2] We therefore hold that while the court might have been more forthcoming in describing its reasoning process, the record sufficiently shows that the trial court accepted Mr. Beck's figure, and reduced the "lodestar" because it did not believe the matter was particularly complex since the case had in essence been previously tried in the criminal proceeding.

As respondent points out, a consideration of other unspoken factors support the trial court's position. First, appellant prevailed on only one of nine causes of action. Next, the amount of damages awarded as de minimis in comparison with the $5,000,000 claim for general

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[2] Like the trial court, we question the wisdom of a system that will only pay a highly qualified defense attorney $90 to $100 per hour to represent a defendant in a death penalty case, yet will pay the same attorney triple that amount to represent the same defendant as a plaintiff in a civil suit for damages.

damages and $250,000 in punitive damages. Finally, appellant prevailed against only two of seven defendants. We presume that at least some of Mr. Beck's pretrial and trial activities were directed against the other four officers and the city of Huntington Park. It would therefore be reasonable to reduce the lodestar for appellant's lack of success against the other defendants. In fact 2/7ths of the requested amount would equal just over $32,000.

Appellant argues that he prevailed on an important issue in the litigation and that the purpose of an attorney fees award is to encourage the legal profession to assist with citizen complaints relative to civil rights violation. Appellant points out that often a pecuniary value cannot be set in determining the value to the individual or society of a favorable plaintiff's judgment; thus an attorney fees award should not necessarily be tied to the

amount of monetary damages. (Riverside v. Rivera (1986) 477 U.S. 561, 573-580.) We have no quarrel with that argument. However, each case must be decided on its own merits. For every case, appellant cites showing a large attorney fee award relative to a small judgment for damages, respondent is able to cite cases involving small damages awards where few (if any) attorney fees were awarded. (Cf. Farrar v. Hobby (1992) 506 U.S. ____, [113 S.Ct. 566, 121 L.Ed.2d 494]; Hensley v. Eckerhart, supra, 461 U.S. 424, 436.) While Mr. Beck's motives and abilities are unquestioned, the federal statutes were not designed to enrich attorneys in the wake of a result which was minor in relation to the time expended. We perceive that is exactly what occurred here. The trial court was in the best position to evaluate such salient factors as the complexity of the case, the reasonable hours expended, the appropriate hourly rate, and

the value of the result. We find that in fulfilling that task, there was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

Not To Be Published.

_____, J.
NOTT

We concur:

_____/s/_____, P.J.
BOREN

_____/s/_____, J.
GATES

Exhibit B:

Order Denying Petition

For Rehearing

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 06/02/94

Thomas E. Beck & Associates
Thomas E. Beck
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RE: Bueno, Antonio Cesar
vs.
Huntington Park, City of
2 Civil B076029
Los Angeles NO. SEC74315

THE COURT:

Petition for rehearing denied.

Exhibit C:

Supreme Court's Order Denying

Petition For Review

Second Appellate District, Division Two,

No. B076029

IN THE SUPREME COURT OF THE STATE OF

CALIFORNIA

IN BANK

CESAR ANTONIO BUENO, Appellant

v.

CITY OF HUNTINGTON PARK, Et Al.,

Respondents.

Appellant's petition for review DENIED.

LUCAS
Chief Justice

(2)

Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

No. 94-316

In The

Supreme Court of the United States

October Term, 1994

In re ANTONIO CESAR BUENO,

Petitioner,

vs.

CITY OF HUNTINGTON PARK, ERIC AULT, ANTONIO LUNA, MICHAEL PERRY, ARTHUR DE CLERCQ, STEVE CASTRO, AND JORGE ROJAS,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED

1. Whether grounds exist for granting the Petition.

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On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE[1]

This Petition is taken from a final judgment disposing of all issues between the parties. The Petition is essentially concerned with the Superior Court's March 30, 1993 disposition of Petitioner's Motion for Attorney's Fees pursuant to 42 U.S.C. § 1988.

[1] Respondents accept petitioner's statement of jurisdiction and the statutes at issue as well as petitioner's citations of opinions below.

On May 17, 1989, Petitioner commenced this civil rights action following his arrest and acquittal on charges of violating California *Penal Code*, § 647(f). The City of Huntington Park and six of its police officers were charged with various civil rights violations and compensatory and punitive damages were sought.

The trial in this matter resulted in defense verdicts for all defendants save two and modest compensatory damages award in the amount of $35,000.00. Subsequently, the jury found in favor of all defendants on the most serious claims of excessive force, malicious prosecution, and assault and battery.

Following the trial, Petitioner sought a substantial fee award in the amount of $114,656.00. Although Petitioner's entitlement to a fee award was not challenged by respondent, the amount being sought was disputed. Following final briefing and argument, the trial court granted the Petitioner's motion and awarded fees in the amount of $30,000.00.

On April 9, 1993, Petitioner filed a Motion for Reconsideration of the court's award which was opposed by Respondents on April 19, 1993. The court heard the Motion for Reconsideration on April 27, 1993 at which time the trial court reiterated the basis of the award of attorney's fees in the amount of $30,000.00 while acknowledging that Petitioner's Motion for Reconsideration was not based on a new set of facts.

Petitioner thereafter unsuccessfully appealed to the California Court of Appeal.

II. SUMMARY OF ARGUMENT

Petitioner subsequently sought rehearing before the Court of Appeal and thereafter, review by the Supreme Court of California. Each of these requests were denied. Clearly, there is not a case which has received more of a federal law affirmation.

As he has done continuously, Petitioner fails to acknowledge that deviations from the lodestar do not suggest an abuse of discretion. A court need not discuss each of the guidelines set forth in *Kerr v. Screen Extras Guild*, 526 F.2d 67 (9th Cir. 1975) as long as the court articulates sufficiently how it made its determination (*Queseda v. Thomson*, 850 F.2d 537 (9th Cir. 1988), while also recognizing that this does not require detailed calculations when making reductions in the lodestar for interrelated unsuccessful claims. *Hensley v. Eckerhart*, 461 U.S. 424 (1941) and *Gates v. Deukemejian*, 987 F.2d 1392, 1404 (9th Cir. 1992).

Thus, the decision of the California courts were not based on the complexity of issues alone as Petitioner claims (Petitioner's Petition for Writ of Certiorari, hereinafter "Writ" at page 17), but was in fact a function of the time spent on the unsuccessful claims as they related to the successful claims, necessarily allowing a lodestar reduction without the need for detailed calculations. The opinion of the Court of Appeal clearly sets forth the factors leading to its affirmation of the trial court's decision which are enumerated on pages 28, 34, and 35 of Petitioner's Writ.

Furthermore, while the court should not look to an award of attorney's fees in a primary action when considering the determination of fees in a later entirely distinct action, that is not the issue which was before the Court of Appeal or which is presently before this court.

III. REASON FOR DENYING THE PETITION

The Petition itself demonstrates the reasons for the denial. First there is no dispute that the trial court faithfully enforced the Petitioner's statutory right to a fee award (Writ at pgs. 5 and 29). Next, there is also ample acknowledgment that the trial court carefully weighed all of the factors *and* arguments which were properly presented in connection with the application. Finally, there is by concession an articulation of the reasons underlying the trial judge's fee award.

This Petition arises not out of concerns of federalism, but rather out of a trial attorney's dispute with his trial judge concerning the amount of fees to which he was entitled. This clearly is not worthy of further review here or elsewhere.

Petitioner has asked this court to review this case essentially arguing that the Court of Appeal applied a "success ratio" to affirm a trial court's decision. Petitioner argues that this is prohibited by federal law. Petitioner also argues that the Court of Appeal affirmed the trial court's decision without articulating its reasons but rather did so based on "unspoken reaosns". [Writ at page 23].

The result of Petitioner's request is that he is asking this court to believe that since Petitioner was the "prevailing party" in a civil action against Respondents, Petitioner is ipso facto guaranteed an award of attorney's fees based on the lodestar calculation provided by Petitioner's counsel. Respondents submit that this reasoning is patently circuitous and thus gives rise to the pivotal underlying issue to be considered, i.e., whether the *degree of success obtained by a litigant is the critical factor in determining the reasonableness of an award of attorney's fees. Farrar v. Hobby,* 113 S.Ct. 566 (1992). It is on this basis that it is further pertinent to point out that the trial court did not accept the plaintiff's lodestar at face value and considered plaintiff's victory de minimis. As Petitioner points out, this in and of itself is a basis for determining an award of reasonable attorney's fees without making specific arithmetic adjustments. (Petitioner's Petition for Rehearing before the California Court of Appeal at pg. 1-Exhibit "A" to Appendix).

IV. CONCLUSION

For reasons already made clear, summary remand is not applicable here.

Each and every case cited by Petitioner in his Writ references case law decided prior to the decision of *Farrar v. Hobby,* supra. As a consequence of that most recent decision, the trial court and the Court of Appeal relied on numerous factors which, in their totality, exposed a de minimis victory for the plaintiff. It is for this reason, as well as Petitioner's failure to recognize the "degree of success" as being the most critical factor in determining

an award of attorney's fees, that Petitioner must necessarily rely on accusations and innuendoes referencing a so-called "suspicion of hostility to federal rights". (Writ at pg. 23).

DATED: September 19, 1994

Respectfully submitted,

NORMAN J. WATKINS
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App. 1

Exhibit A

2nd Civil No. B076029

IN THE COURT OF APPEAL FOR
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CESAR ANTONIO BUENO,

Appellant,

vs.

CITY OF HUNTINGTON PARK, et al.,

Respondents.

Appeal From The Superior Court For
The County of Los Angeles

Honorable Robert J. Higa, Judge

L.A.S.C. Case No. SEC 74315

PETITION FOR REHEARING

CRC 27

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I

***UNLESS THE PLAINTIFF'S VICTORY IS TECHNICAL, DE MINIMUS OR PYRRHIC,* IN DETERMINING REASONABLE ATTORNEYS FEES, TRIAL COURTS MUST MAKE SPECIFIC FINDINGS WITH RESPECT TO THE LODESTAR BEFORE MAKING DOWNWARD ADJUSTMENTS; A TRIAL COURT'S FAHLURE TO COMPLY WITH THIS FOUNDATIONAL REQUIREMENT CANNOT BE AVOIDED TO AFFIRM THIS RULING**

When setting a fee, the district court must first set the presumptive lodestar figure. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484 (9th Cir. 1988). (*Cunningham*), *cert. denied*, 493 U.S. 1035, 110 S.Ct. 757, 107 L.Ed.2d 773 (1990). This is done 'by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate.' *Id.* Next, in rare cases, the district court may adjust the 'presumptively reasonable' lodestar figure based on the factors listed in *Kerr v. Screen Extras Guild*, 526 F.2d 67, 69-70 (9th Cir. 1975) (*Kerr*), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976), 'that have not been subsumed in the lodestar calculation.'

* * *